Supreme Court, U. S.
FILED
MAY 16 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1416

JOSEPH CALIFANO,

Petitioner,

vs.

VENUS MANDLEY, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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QUESTIONS PRESENTED FOR REVIEW.

The respondents object to the petitioner's Question 1 because this issue has never before been raised. The respondents believe that the petitioner's Question 2 is not before the Court on this petition because it pertains exclusively to *Mandley I, Mandley* v. *Trainor*, 523 F. 2d 415 (7th Cir. 1975), and the time for filing a petition for certiorari from that decision has long since past.

STATEMENT OF THE CASE.

The petitioner virtually ignores the facts of this protracted case. The respondents refer the Court to the discussion of the

facts in the opinion of the court of appeals in *Mandley II*, *Mandley* v. *Trainor*, 545 F. 2d 1062 (7th Cir. 1976). The petitioner does not dispute any of the findings of *Mandley II*, in which the court concluded that the United States Department of Health, Education and Welfare (HEW), with the other defendants, the Illinois Department of Public Aid (IDPA), and its director, created an "artifice to avoid the *Mandley I* mandate" for more than a year. *Mandley II* at 1067.

As the court below explained, the state defendants, with the cooperation and assistance of HEW, after the return of the mandate in *Mandley I*, refused at first to state whether or not they were operating an emergency assistance program with federal funds, and later stated that they were not operating such a program under § 406(e) of the Social Security Act, 42 U. S. C. § 606(e). None of the defendants informed the district court that the only change in IDPA's program was its name, and that funding was claimed under another section of the Social Security Act. These actions had the effect of delaying the remand proceedings for nearly a year and necessitating a second appeal. The court of appeals found, and the petitioner does not dispute, that "the state defendants are still operating an emergency assistance program with matching federal funds, although under the guise of a 'special assistance program'," *Mandley II* at 1067, and that this conduct is in the "blatant disregard of the congressional eligibility requirements" of § 606(e). *Mandley II* at 1064. Consequently, the petitioner is incorrect in asserting (Ptn. p. 8) that the state had notified the Secretary "of its election to terminate" the emergency program, which "therefore" led to the dismissal of the case as moot.

The petitioner is also incorrect in stating (Ptn. pp. 6, 16) that the respondents are a class of AFDC recipients. The amended complaint and the judgment state that the plaintiffs include not only AFDC families, but all needy families with children.

The petitioner fails to mention that on January 27, 1977, Mr. Justice Stevens granted a stay of the mandate until February 18, 1977, and the petitioner's motion to extend the stay beyond that date was denied by Mr. Justice Stevens (Case No. A-610). The petitioner also fails to refer to his regulation requiring emergency assistance be delivered "forthwith", 45 C. F. R. § 233.120(a)(5), and does not state that the district court held Illinois' emergency program violates this regulation in taking seven to ten days to deliver aid to eligible recipients.

REASONS FOR DENYING THE WRIT.

A. The Petitioner Has Not Presented Any Reason Which Justifies the Granting of the Writ.

Every court which has construed § 606(e) is in accord with the Seventh Circuit's interpretation. The petitioner fails to mention that, in addition to *Williams* v. *Wohlgemuth*, 540 F. 2d 163 (3d Cir. 1976),[1] the Second Circuit has held that the eligibility requirements of § 606(e) are mandatory, *Lynch* v. *Philbrook*, 550 F. 2d 793 (2d Cir. 1977). In accord are *Ingerson* v. *Sharp*, 423 F. Supp. 139 (D. Mass. 1976), and *Kozinski* v. *Schmidt* (E. D. Wis. 1975), No. 75-C-650. Each court, after examining § 606(e) and its legislative history, concluded that Congress intended that eligibility for emergency aid must include all families designated in § 606(e). The petitioner's position, without judicial support, would allow a state unfettered discretion to choose those emergencies for which it grants aid. If a state could avoid § 606(e) eligibility requirements by merely renaming its emergency program and claiming reimbursement from HEW as a part of its AFDC program, § 606(e) would, as the court of appeals explained, be totally eviscerated.

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1. The petitioner, without explanation states (Ptn. p. 11, n.6) that *Williams* followed a "different line of reasoning" than the Seventh Circuit. The respondents are unable to find such a difference.

The petitioner admits that there is no conflict among the courts of appeal, but states that *Mandley II*, by requiring compliance by HEW, ". . . has deprived the Secretary of the opportunity effectively to litigate the issue before other courts of appeal" (Ptn. p. 11). This seems to be the primary ground the petitioner presents for granting the writ. If HEW were not bound as a defendant by the *Mandley II* mandate, apparently it would ignore the holdings of the courts of appeal on § 606(e)'s mandatory eligibility requirements. The petitioner seems to assert (Ptn. pp. 10, 16-18) that he has the right to abide by one circuit's judgment but disregard it in another circuit, this enforcing § 606(e) upon the states in a varying and arbitrary manner. We submit that this Court should not grant certiorari whenever a federal agency considers itself precluded from seeking conflicting decisions from other courts of appeal.

If the petitioner was dissatisfied with *Mandley I*, he should have sought certiorari. In December 1975, the HEW Secretary applied for an extension of time to petition for certiorari, stating that Illinois had "terminated its emergency assistance program" and that an extension of time was required in order "to permit the court of appeals to consider a motion to vacate its judgment." Such motion was denied by the court of appeals on January 30, 1976. HEW chose not to file its petition thereafter and, instead, embarked on another strategy which the court of appeals found to be an evasion of the *Mandley I* mandate.

The petitioner additionally argues that the order binding HEW and requiring regulations was an abuse of discretion by the court below. However, not a single case is cited holding such relief to be improper. A federal equity court ". . . has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past." *NLRB* v. *Express Publishing Co.*, 312 U. S. 426, 435 (1941).

The relief granted in *Mandley II* recognized the unholy alliance between HEW and IDPA. Had HEW developed and applied uniform standards for emergency assistance after *Mandley I*[2] the connivance found to exist thereafter could have been avoided, and the needy plaintiffs would not have suffered by the delay and obfuscation. *Mandley II* requires HEW simply to take a consistent approach to § 606(e) based on the court's decision.

Since the plaintiffs alleged jurisdiction in part on 28 U. S. C. § 1361, federal mandamus jurisdiction, the court was empowered to grant such relief. Mandamus lies to require a public officer to perform a mandatory duty or to exercise his discretion when required to do so. *Roberts* v. *United States*, 176 U. S. 221 (1900); *United States ex rel. Girard Trust Co.* v. *Helvering*, 391 U. S. 540 (1937).

Neither was the requirement of the promulgation of regulations erroneous. Title 42 U. S. C. § 1302 states that the Secretary "shall" make such regulations as may be "necessary" to the efficient administration of the Social Security Act. Similar mandatory language appears in 42 U. S. C. § 1395x(v)(1), under which the HEW Secretary was required to promulgate regulations in *Kingsbrook Jewish Medical Center* v. *Richardson*, 486 F. 2d 663 (2d Cir. 1973). *See, Caramico* v. *Secretary of the Dept. of Housing and Urban Development*, 509 F. 2d 694 (2d Cir. 1974); *Rockbridge* v. *Lincoln*, 449 F. 2d 567 (9th Cir. 1973); *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F. 2d 584 (D. C. Cir. 1971).

The order binding HEW was not only proper but necessary. The court of appeals had before it in *Mandley II* a record showing that HEW after *Mandley I* refused to inform the district

2. The court of appeals indicated in *Mandley I* that HEW by rulemaking develop "workable definitions" for the eligibility criteria of § 606(e), which it believed "should aid the states in preparing programs that are in accord with the eligibility criteria set by Congress" *Mandley I* at 422-23.

court whether the Illinois defendants were continuing to receive federal funding for their "special assistance" program. HEW sought to delay and confuse the issues before the district court in order to evade *Mandley I*. The present petition shows no change of heart.

B. The Petitioner Should Not Be Permitted to Argue That Mandley I Is Erroneous.

The petitioner attacks the holding of *Mandley I* that § 606(e) eligibility is mandatory (Ptn. pp. 13-16). He should be precluded from so arguing since he had an opportunity to make these contentions in a petition for certiorari but chose not to do so. *Federal Trade Com.* v. *Minneapolis-Honeywell R. Co.*, 344 U. S. 206 (1952); *Hartford Accident & Indemnity Co.* v. *Bunn*, 285 U. S. 169 (1932).

Even in his attack on *Mandley I*, the petitioner has given no reason to show that Congress intended to exclude a certain class of persons, such as AFDC recipients, from the definition of "emergency assistance to needy families with children" in § 606(e). Neither has the petitioner disputed the principle that "once the federal standard of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional." *Burns* v. *Alcala*, 420 U. S. 575, 580 (1975).

The petitioner's statement that the court in *Mandley I* "rested its analysis" on 42 U. S. C. § 602(a)(10) is incorrect[3] (Ptn. p. 14). Instead, the court relied on the interpretation of the Social Security Act as a whole and the legislative intent of

3. Given the petitioner's present interpretation of § 602(a)(10), it is anomolous that he has promulgated a regulation, 45 C. F. R. § 235.70(a)(2), which applies the provisions of § 602(a)(11), also referring to "aid to families with dependent children", to emergency assistance recipients. The respondents also question whether the petitioner believes the fair hearing provision of § 602(a)(4) and the confidentiality provision of § 602(a)(9) are likewise inapplicable to emergency assistance.

§ 606(e). The court responded specifically to the § 602(a)(10) argument by explaining that § 602(a) and § 606(e) "cannot be so neatly and completely severed." *Mandley I* at 422.

C. The Petitioner's Critique of Mandley II is Erroneous and Improper.

For the first time, the petitioner now argues that *Mandley II* encroaches upon his authority under § 602(b) and HEW's "longstanding regulations" (Ptn. p. 8) on special needs to AFDC recipients. 45 C. F. R. § 233.20(a)(2)(v). See also petitioner's Question 1 (Ptn. p. 2). This issue was never presented previously by the petitioner. *Mandley II* does not reach the question of the petitioner's authority to reimburse states for "special needs." Since the petitioner did not raise this issue in the courts below, it should not be considered now. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 238-239 (1940); *McCandless* v. *Furland*, 293 U. S. 67, 74 (1934).

Section 606(e) was meant to apply to a class of persons which is broader than those who receive AFDC. The distinctions between eligibility and funding under § 602 and § 606(e) are numerous.[4] For a detailed discussion of these differences, see *Mandley II* and "Meeting Short-Term Needs of Poor Families: Emergency Assistance to Needy Families with Children", 60 Cornell L. Rev. 879 (1975). As discussed in *Mandley II* at

4. The petitioner's argument that reimbursement of the emergencies of AFDC families is exclusively under § 606(b) while those of non-AFDC families is under § 606(e) leads to absurd and discriminatory treatment of these two classes. The "forthwith" requirement of HEW, § 233.120(a)(5), for example, applies only to emergency assistance and not to special needs which the petitioner explains is governed by the "reasonable promptness" requirement of § 602(a)(10). Thus, under the petitioner's argument, non-AFDC recipients who suffer emergencies would be entitled to receive assistance more quickly than AFDC recipients. Congress intended all persons suffering emergencies to be helped immediately and did not single out AFDC recipients for slower treatment.

1069-71, the enactment of emergency assistance was meant by Congress to be a new and additional program. The legislative history demonstrates that there was no mention of limitation of eligibility to non-AFDC recipients nor discussion of "special needs" under § 602(b). The Under-Secretary of HEW, Wilbur Cohen, supported emergency assistance when he testified before the Senate Finance Committee, stating that there was "no mechanism in the existing law to meet the special needs of children which may arise in a crisis situation". Neither he nor others referred to any conflict with "special needs". Hearings before the Senate Committee on Finance on H. R. 12080, the Social Security Amendments of 1967, Public Law 90-248, 90th Cong., 1st Sess., p. 270 (1967).

Finally, the petitioner's argument that the result of denial of certiorari would mean the reduction of emergency assistance by states is speculative and conclusary. The affidavit of Nicholas Norton, upon which this argument is based, is filled with unsupported generalization and is unreliable. Congress intended § 606(e) to reach all those who are destitute as a result of an emergency. Whether a state which is required to expand eligibility to conform to § 606(e) will decide to forsake receipt of federal funding and eliminate emergency assistance altogether is highly questionable. There is no competent evidence in the record supporting the petitioner's assertion.

CONCLUSION.

The respondents pray that this Court deny the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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